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No. (1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

KELVIN DEWAYNE ALTHEIMER,
Petitioner,

v.

SETON CORPORATION D/B/A BAPTIST HOSPITAL,
Respondent.

"The Supplemental Appendixes"

On Petition For A Writ Of *Certiorari*
To The United State Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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RACIAL DISCRIMINATION CASE
QUESTION PRESENTED:

1. Regulation of discovery is very much the district court's province and the denial of an extension tested only for abuse of discretion U.S. vs. Sayer, 450 F. 3d 82.

2. Why the decision of the court of the appeals conflicts with this court's cases allowing state law to impose liability greater than the liability imposed by Federal Law.

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PETITION FOR WRIT OF CERTIORARI

Kelvin Dewayne Altheimer, Pro Se Petitioner of the lower income indigent person of the United States of America, respectfully petitions for a writ of Certiorari to review the judgment of the United States Court of appeals for the Sixth Circuit.

OPINION BELOW

In the Circuit Court for the State of Tennessee, Davidson County.

From the United States District Court for the Middle District of Tennessee, Nashville division.

United States Court of Appeals for the Sixth Circuit, affirm the decision of the district court.

JURISDICTION

The opinions of the lower courts decision, to the United States Supreme Court of appeals for the ninth circuit on petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The first amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a reckless of grievances.

The Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment: All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the U.S. and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I plaintiff re-filed my complaint on April 5, 2005 in the United States district court for the middle district of Tennessee, case number 3-06-0334, Kelvin Altheimer vs.

Seton Corporation d/b/a Baptist Hospital on the of lack of subject matter jurisdiction dismissed March 10, 2005 by U.S. District Judge Todd Campbell /s/.

Stating the grounds for filing this case in Federal Court includes, actions brought under 42 U.S.C.A. 1981-1983 for racial discrimination 164 ALR Fed 483 and private discrimination against aliens: 99 ALR Fed 835 42 USCA 1981 creating a civil action. Attached to my compliant is the defendant's witness list from circuit court case number 05C-1084. Statement of my claim as briefly as possible the facts of my case. I plaintiff was treated and released same day. But before leaving the hospital got into an altercation with security guard officer Robert Antone. Officer Antone subdued me with pepper spray and to the ground, for no probable cause. I plaintiff was sitting down in E.R. waiting room, when doctor and nursing staff took me to make a phone call for someone to pick me up. I'm quietly sitting alone with other people, then here comes officer Antone telling me to leave in 30 minutes from the hospital, if my ride comes or not. I said, what about everybody else waiting here. I wander why because I'm the only black man sitting and waiting like the white people sitting and waiting.

I caused no trouble at all, saying to officer Antone: you can not put me outside in the cold to wait on my ride; that's not right.

He said it's 11:00 a.m., 11:30 a.m. I have to leave. I said, you can not put me outside for no probable cause in the cold air and then I got up and proceeded down the hallway from E.R. waiting room toward front information desk to see if my ride arrived.

The next thing I remember was turning around and being pepper sprayed by Officer Antone.

Forced to the ground and taken to jail by Metro

Nashville Police and Officer Antone following behind us. For no probable cause, I spent 5-7 days in jail, suffering from the defendants knee in my back, causing more problems with my back.

FACTUAL BACKGROUND

The district court allowing this case or refiling/ reopening of this claim, which was dismissed for lack of subject matter jurisdiction March 10, 2005 /s/ U.S. District Judge Todd J. Campbell to re-enter into the docket case # 3-06-0334 and after taking evidence from circuit court case # 05C-1084; the trial court issued a preliminary and referred this case to the magistrate judge for entry of a scheduling order; decision on all pretrial, non dispositive motions; and report and recommendation on any dispositive motions. The scheduling order shall include a trial date. Fed. R. Civ. P. 26(a)(1) regarding required initial discovery disclosures, shall not apply. Pursuant to local Rules [1](e)(1) and Fed. R. Civ. P. 26(d), discovery is not stayed absent further order of the court /s/ U.S. District Judge Todd J. Campbell on April 18, 2006.

Both defendant's attorney and Seton Corporation d/ b/a Baptist Hospital challenging the trial court's decision to hear the case and subsequent grant of a permanent injunction.

THE DISTRICT COURT UPHOLDS THE INJUNCTION.

Affirming the Davidson County Circuit Court of Tennessee case # 05C-1084 decision by two orders. /s/ June 13, 2005 by 5th Circuit Court Judge Walter Kurtz and /s/ August 8, 2005 by 7th Circuit Court Probate Judge David Randall Kennedy Sr.

The district Court found no jurisdictional defect in Kelvin Altheimer action. "A review of the record indicates that the instant case presents a real controversy between the parties and is ripe for judicial resolution and has a direct immediate impact on the parties."

Like the district court, the court of appeals for the Sixth Circuit held that an injunction was appropriate because Altheimer had established irreparable harm and has no adequate remedy at law, noting Altheimer lower court testimony that "competition is not unwelcomed, but the 'playing field' is not level when false testimony of the defendant's and evidence of a witness list which witness did not show up in trial for defense, ruled in favor of defendant's in which no one else is permitted by law to do so.

Despite the rulings of two separate lower courts that Altheimer was entitled to a permanent injunction, the court of appeals for the sixth circuit and district court accepted jurisdiction to consider whether the trial court's decision amounted to an endorsement of an impermissible collateral attack on a different court's previous judgement.

Altheimer defended the lower court decisions arguing that binding it to the earlier adjudication would violate it's rights under the due process clause of the fourteenth amendment.

Even though Altheimer was denied intervention in Seton Corporation d/b/a Baptist Hospital original case # 3-05-0188; found Atheimer injunction action to be an impermissible collateral attack, reasoning that "by asserting the circuit court case record 05C-1084 to prove the lying of the defendant's and evidence for lack of subject matter jurisdiction dismissed /s/ district Judge Todd J. Campbell on March 10, 2005. Altheimer seeks

it's own relief that directly conflicts with the terms of the Davidson County Circuit Court of Tennessee Judgment.

Using the jurisprudence that limits the rights of the parties to a suit that results in a judgment to attacking the judgment, the Ohio Supreme Court ruled that A person could not challenge the original decree other than for fraud or lack of jurisdiction.

"Altheimer argues that it's action does not involve a 'collateral attack' because it is merely attempting to vindicate it's own rights. However, in this case, the economic interests Altheimer seeks to advance are incapable of supporting it's efforts to attack 2005 U.S. District Court Middle District of Tennessee, Nashville judgment."

The court went on to state, "intervention provided Altheimer with a potential opportunity to interject it's interest in the U.S. District Court case, but whether Altheimer success fully asserted those interests at the time is not relevant to it's ability to launch the instant collateral attack.

In strongly worded dissent, Justice O'Donnell found that the court's holding "misapplies the collateral attack doctrine and sets a bad precedent for future litigants. Citing this court's due process jurisprudence including Hansberry V. Lee, 311 U.S. 32 (1940), and Martin V. Wilks, 490 U.S. 755 (1989), Justice O'Donnell summed up the problem with the majority's reasoning: "The courts judgment is binding only upon the parties to the suit.

Even assuming, arguendo, that Altheimer's action is a collateral attack, I would not hold it to be an "impermissible" collateral attack. The United States Supreme Court has recognized that " '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a

litigation in which he is not designated as a party or to which he has not been made a party by service of process.' Hansberry V. Lee (1940), 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22. This rule is part of our 'deep-rooted historic tradition that everyone, should have his own day in court.' 18 C. Wright, A. Miller, & E. Copper, Federal Practice and Procedure [(1981) 417, Section 4449].

REASON FOR GRANTING THE WRIT SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI

For example, unlimited discovery concerning contacts for general jurisdiction has been viewed as unreasonable, but the period cannot be limited to the year in which the complaint occurred. Metropolitan Life Inc. Co. vs. Robertson - Ceco Corp. 84 F. 3d 560, 575-576 (2nd Cir.) cert. denied 519 U.S. 1006 (1996).

No discovery is required if the record establishes that the defendant did not commit an act covered by the long-arm statute. Wyatt vs. Kaplan, 712 F 2d 1002, 1003 (5th Cir. 1983).

The district Court Middle District of Tennessee Davidson County decision directly conflict with the Circuit Court for the state of Tennessee, and the Sixth circuit Court of Appeal of the United States affirm the district court's order rule 34(j) (2) (c), rules of the Sixth Circuit. Based on subject matter jurisdiction of which discrimination action and civil rights violation. and the U.S. Court of Appeals for the Sixth Circuit conflicts with this court's case allowing state law to impose liability greater than the liability imposed by Federal Laws. And 44.1.05 review of determination of foreign law. [1]

Determination of Foreign law are subject to De Novo review.

FALSE TESTIMONY

Dismissal For Fraud On The Court

Useful for more than just cross-examination.

Dismissal of a cause of action for fraud on the court is a sanction imposed upon a plaintiff when he has been dishonest, particularly with respect to facts that are important to the case.

Dishonest statements do not have to be made strictly to the Court, but include statements made to anyone in connection with the case. They can be made through testimony, either at trial or deposition; to the plaintiff's own counsel; opposing counsel; treating physicians; key witnesses in the case; and other parties to the litigation.

Standards for Dismissal for Fraud

(Florida State Court)

The ability to dismiss a litigant's case in Florida's state courts is prescribed by case law, not statue. In making a determination as to whether to impose the ultimate sanction, the Court looks at whether the plaintiff's dishonesty reveals an intent of the plaintiff to do one of two things; knowingly set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact, or unfairly hamper the presentation of the opposing party's claim or defense. It requires clear and convincing evidence of intent to defraud. *Cox v. Burke*, 706 So.2d 43, 47 (Fl. 5th DCA 1998), *Aoude v. Mobil Oil Corp.*, 892 F. 2d 1115, 1118 (1st Cir. 1989). The right to dismiss an action is an obligation of the court to deter fraudulent claims from proceeding in court *Savino v. Fla. Drive In Theatre*, 597So. 2d 1011,

1012 (Fla. 4th DCA 1997).

Standards for Dismissal for Fraud
(Federal Court)

Unlike State Court, dismissal for fraud in Federal Court is governed by case law and Federal Rule of Civil Procedure 41(b). Dismissal under Rule 41(b) is appropriate where plaintiff has engaged in bad faith or egregious conduct, or where plaintiff's conduct threatens the very integrity of the judicial process. Pope v. Federal Express Corp. 138 F.R.D. 675, 682 (W.D. Mo. 1990). In addition to the above, dismissal of a lawsuit is within the court's discretion, and is appropriate where the court believes fraud has been committed. Roadway Express, Inc. v. Piper, 447 U.S. 752, 765, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980).

Conduct Necessary for Dismissal for Fraud

What the court considers egregious enough for dismissal is determined on a case by case basis, and depends upon the nature of the fraud and the relation of the fraudulent statements to the underlying facts of the case. A plaintiff's failure to disclose all the facts relating to an issue important to the case (failure to tell the whole truth) can constitute fraud, such as to warrant dismissal of the lawsuit. Metro. Dade Co. v. Martinsen, 736 So.2d 794 (Fla. 3rd DCA 1999). Also, a plaintiff's failure to be honest when answering questions that are central to a material issue in the case can warrant dismissal. Metro Dade Co. These false or incomplete statements can be made through deposition testimony, discovery responses, and responses to requests for admissions.

The courts have held that dishonesty as to collateral matter can be fraud in certain circumstances. False testimony as to prior addresses, marital status, and social

security number can rise to the level needed to warrant dismissal. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998). Important factors here would be the obviousness of the dishonest statements and the voluminous nature of the false statements. Additionally, if it were apparent that plaintiff was attempting to deceive the court through a series of insignificant lies, dismissal would be likely.

If left standing, this decision will allow state courts to circumvent this court's long standing holding "that extreme applications of doctrine of Res judicata may be inconsistent with a Federal right that is fundamental in character."

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A
App.1

In the supreme court of the United States of appeals for the ninth circuit.

No. _____

Kelvin DeWayne Altheimer,
Petitioner
vs.
Seton Corporation d/b/a
Baptist Hospital, Respondent

Collateral attack- prior judgment entered in different court - attack did not claim that prior judgment issued without jurisdiction or as product of fraudulent conduct.

(No. 3-06-0334 - submitted April 5, 2006 - decided September 5, 2006. By Judge Todd J. Campbell.

Appeal from U.S. District Court Middle district of Tennessee, Nashville division for Davidson County, Nos. 3-06-0334 Report and Recommendation submitted August 31, 2006.

REPORT AND RECOMMENDATION

For the reason stated below, the undersigned RECOMMENDS that: 1) the defendant's motion to dismiss for insufficient service of process be denied: 2) the defendant's motion to dismiss be granted because the plaintiff has failed to state a claim on which relief may be granted, because this action is barred by the statute of limitations, and because this action is barred by the doctrine of collateral estoppel; 3) the plaintiff's pending motions be denied; 4) any appeal not be certified as taken in good faith under 28 U.S.C. § 1915(a)(3).

I. INTRODUCTION

The plaintiff, Kelvin DeWayne Altheimer, proceeding *pro se* and in *forma pauperis*, is a resident of Ecorse, Michigan. (DE # 1, ¶, p. 1) He brings this action under 28 U.S.C. §§ 1981, 1982, and 1983 against the Seton Corporation doing business as Baptist Hospital in Nashville, Tennessee. (DE # 1, ¶, p. 1) This action was referred to the undersigned on April 18, 2006 "for entry of a scheduling order: decision on all pretrial, nondispositive motions; and a report and recommendation on any dispositive motion." (DE # 4)

II. BACKGROUND

Altheimer asserts that he had been drinking at a bar in Nashville when he went to Baptist Hospital for a headache at approximately 3:00 o'clock the morning of January 22,, 2005. (DE # 1, ¶ 4 cont. p.4) He avers that he was given an x-ray, fed breakfast, and then discharged at approximately 11:00 a.m. that same day. (DE # 1, ¶ 4 cont. p.4)

Altheimer claims that, while he was sitting in the emergency waiting room, Officer Robert Antone, a Baptist Hospital security officer, approached him and told him that he had 30 minutes for someone to pick him up otherwise Officer Antone was going to put him out of the hospital (DE # 1, ¶ 4 cont. p.2) According to Altheimer, when he went to the front desk to see if his ride had arrived, Officer Antone sprayed him with pepper spray for no reason and then forced him to the ground. (DE # 1, ¶ 4 cont. p.3)

Altheimer claims that he was taken into custody by a Metro police officer and that he spent 5 days in jail charged with disorderly conduct. (DE # 1, § 4,, cont. pp. 3, 6) According to Altheimer, the charge was dismissed on March 5, 2005. (DE # 1, ¶ 4,, cont. p. 6)

On March 5, 2005, Altheimer brought an action in district court against Baptist Hospital setting forth the identical facts that he recounts in this action. *Kelvin Altheimer v. Baptist Hospital*, Case No. 3:05-0188 (M.D. Tenn., Mar. 10, 2005)(Campbell, J.). The action was dismissed on March 10, 2005 for want of jurisdiction. *Id.* (DE # 3). Altheimer did not appeal, nor did he file any post-judgement motions.

The record shows that Altheimer then brought a related civil action in the Davidson County Circuit Court. *Kelvin Dewayne Altheimer v. Seton Corporation d/b/a Baptist Hospital*, No. 05C-1048 (Davidson Cnty. Cir. Ct. 2005)(Kurtz, J.).[1] The Davidson County Circuit Court subsequently dismissed most of Altheimer's claimes - including his federal constitutional claims under §§ 1981, 1982, and 9183 - except for battery and false arrest/imprisonment. *Id.* (Order, filed Jun. 6, 2005). Approximately two months later, Judge Kurtz ordered, adjudged, and decreed that "the Plaintiff's claim against Defendant, Seton Corporation d/b/a Baptist Hospital, are hereby dismissed in their entirety, with prejudice, and a final judgment is entered in favor of Defendant." Id. (Final Judgment, entered Aug. 8, 2005).

The documentation provided by Altheimer shows that he appealed the judgement of the trial court. Kelvin Altheimer v. Baptist Hospital, No. M2005-02040-COA-R3-CV (Tenn. App. 2006). Research has revealed that the appeal was dismissed February 2, 2006 on procedural grounds.

Althemier filed the complaint in this action on April 5, 2006. (DE # 1) The defendant filed a motion to dismiss and supporting memorandum of law on May 17, 2006. (DE # 9-10) In response, Altheimer filed the following on June 8, 2006: 1) a "Motion Not To Dismiss" (DE # 16); 2)

a motion for "recoil" in Case No. 3:05-0188(DE # 18); 3) a motion to supplement the record with pleadings from Case No. 3:05-0188 (DE # 19); 4) a motion supporting his claims for "everything" (DE # 20).

III. ANALYSIS

The defendant sets forth the following arguments in support of the motion to dismiss: 1) insufficiency of service of process (DE # 10, pp. 3-4); 2) failure to state a claim on which relief may be granted (DE# 10, pp. 4-5); 3) the complaint is barred by the doctrine of collateral estoppel (DE # 10, pp. 7-8). The defendant sets forth two arguments in support of 2) above: first, that Altheimer has failed to allege any facts to support his claim that he was an alien or subjected to racial discrimination; and second, that the claims are barred by the statute of limitations.

A. Insufficiency of Service of Process

Citing rule 4(h), Fed R. Civ. P., the defendant argues that service of process in this action was insufficient and, as such, the complaint is subject to dismissal under Rule 12(b)(5), Fed. R. Civ. P. (DE # 10, pp. 3-4)

The Federal Rules of Civil Procedure provide that, "unless otherwise provided by federal law, service upon a domestic or foreign corporation...that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed" shall be made "pursuant to the law of the state in which the district court is located" or "by delivering a copy of summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process..." Rules 4(e)(1), 4(h) and 4(h)(1), Fed R. Civ. P.

The record shows that process was served on Boult, Cummings, Conners & Berry, PLC,, the law firm that represented the defendant in the case brought by

Altheimer in the Davidson County Circuit Court and the law firm representing the defendant in the instant action. (DE # 10, p. 4) According to the defendant, Boult, Cummings, Conners & Berry "is not authorized, either under...Rule [4(h)] or by statute, to accept service" on its behalf. (DE # 10, p.4)

Apart from the self-serving statement that Boult, Cummings, Conners & Berry is not authorized to accept service of process, the defendant has provided nothing that would permit the Court to conclude that the defendant is entitled to relief under Rule 12(b)(5). Although a certified copy of documentation filed with the Secretary State for the State of Tennessee that identifies who the appointed agent is for services of process under Tenn. Code Ann. § 48-15-101 would have settled the matter, as presented, the defendant's unsupported argument proves nothing.

The defendant has failed to show that it is entitled to judgment as a matter of law based on sufficiency of service of process. Therefore, the defendant's motion to dismiss under Rule 12(b)(5) should be denied.

B. Failure to State a Claim on Which Relief May be Granted

In dismissing a complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., "[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true." *Beztak Land Co. v. City of Detroit*, 298 F.3d 559, 565 (6th Cir. 2002) (quoting *Block v. Ribar*, 156 F.3d 673, 677, (6th Cir. 1998)). "'A motion to dismiss under Rule 12(b)(6) should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (citing *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001))(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Ultimately, because a Rule 12(b)(6) motion tests the sufficiency of the complaint, the Court's review amounts to a determination of whether it is possible for the plaintiff to prove any set of facts in support of his claims that would entitle him or her to relief. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995)(explaining that a court "should deny [a Rule 12(b)(6)] motion unless it is clear that the plaintiff can prove no set of facts in support of h[is] claim that would entitle h[im] to relief') *Mayer v. Mylod*, 988 F. 2d 635 (6th Cir. 1993)("The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true"); see *Scheid v. Fanny Farmer Candy Shop, Inc.*, 859 F. 2d 4434, 436 (6th Cir. 1988)("[a] Rule 12(b)(6) motion tests whether a cognizable claim has been pleaded in the complaint" and explaining that a claim should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

1. Failure to Allege Facts to Support a Claim of Discrimination

The defendant argues that it is entitled to relief under Rule 12(b)(6) because Altheimer has failed to provide any factual allegations that he is an alien, and that the factual allegations of discrimination that he does provide are conclusory. (DE# 10, pp. 5-6) The undersigned believes that the issue is more basic than that.

Title 42 U.S.C.§ 1981 pertains to the right to enter into and to enforce contracts without fear of discrimination. There are no contractual issues in this case. Title 42 U.S.C. § 1982 pertains to the right of every citizen to enjoy property rights without discrimination. There also are no property rights at issue in this case.

To state a claim under § 1983, the plaintiff must allege and show: 1) that he was deprived of a right secured by the Constitution or laws of the United States: and 2) that the deprivation was caused by a person acting under color of state law. Parratt v. Taylor, 451, U.S. 527, 535 (1981)(overruled in part by *Daniels vs. Williams*, 474 U.S. 327, 330 (1986)); *Flagg Bros v. Brooks*, 436 U.S. 149, 155-56 (1978); *Black v. Barberton Citizen Hosp.*, 134 F.3d 1265, 1267 (6th Cir. 1998). Both elements of this two-part test must be met to support a claim under § 1983. *See Christy v. Randlett*, 932 F. 2d 502, 504 (6th Cir. 1991).

The defendant does not appear to be a state actor for purposes of § 1983 nor does Altheimer allege that it is. Even assuming for the sake of argument that the defendant were a state actor, Altheimer's only possible legal theory is that the defendant is liable for the alleged actions of Officer Antone. However, the law is well settled that actions brought against state actors cannot be maintained on a theory of *respondeat superior, see e.g., Monell v. Dept. of Social Serv's of the City of New York, et al.*, 436 U.S. 658, 659, 691-95 (1978); *Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76, 80-81 (6th Cir. 1995); *Dunn vs. Tennessee*, 697 F. 2d 121, 128 (6th Cir. 1982), unless the defendant was personally involved in the alleged violations of the plaintiff's constitutional rights, see *s.g., Copeland vs. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995); *Bellamy vs. Bardley*, 729 F. 2d 416, 421 (6th Cir. 1984). For vicarious liability to attach, the defendant must have "encouraged...directly participated...authorized, approved, or knowingly acquiesced..." in the violations alleged. *See Shehee vs. Luttrell*, 199 F.3d 295, 300 (6th Cir. 199).

Altheimer does not allege that the defendant was directly responsible for any of the alleged actions of

Officer Antone. Nor does he allege that Officer Antone acted pursuant to a policy or custom of the defendant's that violated his constitutional rights. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 :(1992); *Stemler v. City of Florence*, 126 F.3d 856, 865 (6th Cir. 1997). In fact he provides no factual allegations with respect to the defendant at all.

As explained above, the complaint fails to state a claim on which relief may be granted.

2. Statute of Limitations.

The defendant argues that the complaint should be dismissed because it was not filed within the statute of limitations governing civil rights actions arising in Tennessee. (DE # 10, ,pp. 6-7)

Congress did not establish a limitations period applicable to civil rights actions, therefore, federal courts "borrow" analogous state statutes of limitations. *See Wilson v. Garcia*, 471 U.S. 262, 276 (1985); *Board of Regents v. Tomanio*, 446 U.S. 478, 483-85 (1980); *Southerland vs. Hardaway Management Co., Inc.*, 41 F.3d 250, 253 (6th Cir. 1995). For all §§ 1981, 1982, and 1983 actions, federal courts apply the state personal injury statute of limitations. *See Goodman vs. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987)(§§ 1981 and 1982 claims); *Wilson*, 471 U.S. at 280 (§1983 claims). The statute of limitations for personal injury arising in Tennessee and brought under federal civil rights statutes is one year. See Tenn. Code Ann. § 28-3-104(a)(3); *Merriweather vs. City of Memphis*, 107 F.3d 396, 398 (6th Cir. 1995); *Jackson vs. Richards Med. Co.*, 961 F. 2d 575, 578 (6th Cir. 1992).

Although the duration of the statute of limitations is governed by state law, federal standards govern when the statute begins to run. *See Wilson*, 471 U.S. at 267; *Sevier v. Turner*, 742 F. 2d 262, 272 (6th Cir. 1992). The

statute of limitations begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 857 (6th Cir. 2003). Ordinarily, the discovery rule" applies to establish the date on which the statute of limitations begins to run, i.e., the date when the plaintiff knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of his action. *Sevier*, 742 F. 2d at 273. This inquiry is objective and the court looks "to what event should have alerted the typical lay person to protect his or her rights." *Hughes vs. Vanderbilt*, 215 F.3d 543, 548 (6th Cir. 2000); see also *Dixon vs. Anderson*, 928 F. 2d 212, 215 (6th Cir. 1991).

Officer Antone's alleged actions on the morning of January 22, 2005 constituted the injury that gave rise to Altheimer's cause of action. However, Altheimer did not file this action until April 5, 2006, approximately two and one-half months after the one-year statute of limitations had run.

The statute of limitations may be tolled in actions alleging civil rights violations. See *e.g.*, *Andrews vs. Orr*, 851 F. 2d 146, 151 (6th Cir. 1988). The Supreme Court likewise has recognized the doctrine of equitable tolling in civil rights cases, holding that statutory filing deadlines "should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Zipes vs. Transworld Airlines*, Inc., 455 U.S. 384, 397 (1982). Rather, the statutory filing deadlines are more analogous to a limitations statute, "subject to waiver as well as tolling when equity so requires..." *Id.* at 398.

Whether courts apply equitable tolling depends on an analysis of the following factors: 1) lack of actual notice of filing requirements; 2) lack of constructive

notice of filing requirements; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; 5) the reasonableness of a plaintiff remaining ignorant of the notice requirement. *Andrews*, 851 F. 2d at 151 (*citing Wright v. State of Tenn.*, 628 F. 2d 949, 953 (6th Cir. 1980)). Altheimer does not allege a lack of actual or constructive notice of the filing requirements or reasons for not knowing the expiration of the statue of limitations that would make his ignorance reasonable. Moreover, Altheimer does not argue that the doctrine of equitable tolling should be applied in this case. Even if he did, because Altheimer previously sought relief in this matter in both state and federal court within the required limitations period, the undersigned would remain of the view that equitable tolling is not warranted in this action.

For the reasons explained above, this action is barred by the statute of limitations. Therefore, the defendant's motion to dismiss should be granted on these grounds as well.

C. Collateral Estoppel

The defendant argues that "the issues presented are identical to those already litigated and decided in the Circuit Court Case." (DE # 10, pp. 7-8). As such, the defendant argues that it is entitled to have the case dismissed under the doctrine of collateral estoppel. (DE # 10, pp. 7-8)

The broad doctrine of *res judicata* encompasses both claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). *J.Z.G. Res., Inc. v Shelby Ins. Co.*, 84 F.3d 211, 214 (6th Cir. 1996). Under claim preclusion, a final judgment on the merits bars any and all claims by the parties or their privies based on the same cause of action, as to every matter actually litigated, as well as every theory of recovery that could have been presented.

Id. Under issue preclusion, once an issue actually is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action when used against any party to the prior litigation. *Montana vs. United States*, 440 U.S. 247, 152-54 (1979).

The doctrine of collateral estoppel applies when: 1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation; 2) the issue was actually litigated and decided in the prior action; 3) the resolution of the issue was necessary to judgment on the merits in the prior litigation; 4) the party to be estopped had a full and fair opportunity to litigate the issue. *Wolfe v. Perry*, 412 F.3d 707, 716 (5th Cir. 2005)(citing *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005)). It is clear from the record that the issues in Altheimer's case in the Davidson County Circuit Court were identified to those in this action, that those issues were litigated and decided, that the resolution of those issues was necessary to the judgment on the merits, that Altheimer was a party to that prior litigation, and that Altheimer did, in fact, litigate the specific issues that he now raises in this action.

Altheimer's claims before this Court are raised under §§ 1981, 1982, and 1983. The record shows that Altheimer also raised his §§ 1981, 1982, and 1983 claims in the Davidson County Circuit Court, but that the Circuit Court declined to hear those claims. Instead, the trial court heard only those issues pertaining to Altheimer's claims of battery and false imprisonment stemming from Officer's Antone's alleged conduct. Nevertheless, the issues that were adjudicated in the Davidson County Circuit Court are the same issues that Altheimer must prove to establish that he is entitled to relief under §§

1981, 1982, and 1983 – which the undersigned previously concluded he was not.

For the reasons stated above, the doctrine of collateral estoppel applies in this action. Therefore, the defendant's motion to dismiss should be granted on these grounds.

D. Plaintiff's Pending Motions

1. Plaintiff's "Motion Not To Dismiss"

In his memorandum in support of his motion not to dismiss (DE # 17), Altheimer: 1) asserts that his previous cases were necessary to "get the evidence" that he needed to "prove [his] case for racial discrimination and against aliens," pp. 1, 6); 2) maintains that the instant action is not the same as that filed in Davidson County Circuit Court, pp. 2, 8: 3) repeats the factual allegations set forth in his complaint, pp. 3-5, 8-9; 4) provides the court with several folksy expressions pertaining to this matter, pp. 6-8. Altheimer does not, however, provide any legal arguments, references to the record, or citation to relevant legal authority that challenges the grounds for the defendant's motion to dismiss. Therefore, Altheimer's "Motion Not To Dismiss" should be denied.

2. Plaintiff's Motion for "Recoil" in case No. 3:05-0188

Altheimer has filed a motion to "recoil" the district court's judgment in Case No. 3:05-0188. (DE # 18) The undersigned liberally construes this motion as a motion to reconsider the final judgment in his previous case in district court. Because Case No. 3:05-0188 has nothing to do with this action, the motion should be denied.

3. Plaintiff's Motion to Supplement the Record with The Record in the Davidson County Circuit Court Case No. 05C-1048

Altheimer has moved the Court for permission to

supplement the record in this action with the record in his Davidson County Circuit Court case. (DE # 19) However, for reasons stated herein, granting Altheimer permission to do so would be futile. Accordingly, the motion should be denied.

4. Plaintiff's Motion Supporting His Claims

In this motion, Altheimer cites to numerous sources in support for his "base amount" demand for forty million dollars ($40,000,000.00) in damages plus punitives (DE # 20) As reasoned herein, Altheimer is not entitled to relief. Therefore, this motion should be denied.

VI. Conclusion

For the reasons stated above, the undersigned RECOMMENDS that: 1) the defendant's motion to dismiss for insufficient service of process be denied; 2) the defendant's motion to dismiss be granted because the plaintiff has failed to state a claim on which relief may be granted, this action is barred by the statute of limitations, and this action is barred by the doctrine of collateral estoppel; 3) the plaintiff's pending motions be denied; 4) any appeal not be certified as taken in good faith under 28 U.S.C. § 1915(a)(3).

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation within which to file with the District Court any written objections to the proposed findings and recommendation made herein. Any party opposing shall have ten (10) days from receipt of any objections filed regarding this Report within which to file a response to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation may constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140, *reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 15th day of August, 2006.

Joe B. Brown
Magistrate Judge

Dismissal for Fraud on the Court

Useful for more than just cross-examination.

Dismissal of a Cause of Action for Fraud on the Court is a sanction imposed upon a plaintiff when he has been dishonest, particularly with respect to facts that are important to the case.

Dishonest statements do not have to be made strictly to the court, but include statements made to anyone in connection with the case. They can be made through testimony, either at trial or deposition; to the plaintiff's own counsel; opposing counsel; treating physicians; key witness in the case; and other parties to the litigation.

Standards for Dismissal for Fraud (Federal Court)

Unlike State Court, dismissal for Fraud in Federal Court is governed by case law and Federal Rule of Civil Procedure 41(b). Dismissal under rule 41 (b) is appropriate where plaintiff has engaged in bad faith or egregious conduct, or where plaintiff's conduct threatens the very integrity of the Judicial process. Pope v. Federal Express Corp. 138 F.R.D. 675, 682(W.D. M.O. 1990). In addition to the above, dismissal of a lawsuit is within the court's discretion, and is appropriate where the court believes fraud has been committed. Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed. 2d 488,100 S. Ct. 2455 (1980).

Conduct Necessary for Dismissal for Fraud

The Courts held that dishonesty as to collateral matter can be fraud in certain circumstances. False

testimony as to prior address, marital status, and social security number can rise to the level needed to warrant dismissal. Cox v. Burke, 70b So. 2d 43 (Fla 5th DCA 1998). Important factors here would be the obviousness of the dishonest statements and the voluminous nature of false statements. Additionally, if it were apparent that plaintiff was attempting to deceive the court through a series of insignificant lies, dismissal would be likely.

[4] Assigned Counsel.

In a 1983 action, the Supreme Court in Mallard vs. United States District Court, Cooper vs. Brookshire, 70 F. 3d 377, 378 (5th Cir. 1995) determined, by a five to four vote, that the provision of the Federal in Forma Pauperis statute authorizing Federal Courts to "request an attorney to represent an indigent litigant 28 U.S.C. 1915 (e) (1), formerly 1915 (d), does not authorize Federal Courts to make "coercive" appointments of counsel. Mallard vs. United States Dist. Court, 490 U.S. 296, 310 (1989).

820 depositions and discovery C.A.I. (Me) 2006. Regulation of discovery is very much the district court's province and the denial of an extension tested only for abuse of discretion: U S. vs. Sayer, 450 F.3d 82.

Rules:

* Exception to doctrine that court rendering prior judgement decides its own jurisdiction: Other cases have occasionally held that claim or issue preclusion will not bar collateral attack when congress has vested sole authority to adjudicate certain claims in a particular forum. See e.g., capitol servs., Inc. NLRB, 347 U.S. 501, 947-950 (Regional Reorg. ct.1976), cert. denied, 429 U.S. 1095 (1977).

* Discretionary dismissal of supplemental jurisdiction

claims: If prior action is based on diversity jurisdiction, federal court is required to adjudicate state claims and subsequent state action is barred. Kale vs. Combined Ins. Co. of am., 924 F. 2d 1161, 1165 (1st Cir.), cert. denied, 502 U.S. 816 (1991). Also See failure to plead pendant claim brings it within bar of judgement dismissing federal action for failure to state claim. Restatement (second) of judgement 25 cmt. e and illus. 10 (1982), See Jones vs. Holvey, 29 F. 3d 828, 832 (3rd Cir. 1994); See e.g., Lee vs. Village of River Forest, 936 F. 2d 976, 980 (7th Cir. 1991) and Brown vs. Federated Dep't Stores, Inc., 653 F. 2d 1266, 1267 (9th Cir. 1981).

Recognition and Enforcement of Federal Court Judgments:

State and federal courts must apply federal law to recognition of judgements of federal courts.

1. State courts are bound to recognize the judgements of federal courts. See Stoll vs. Gottlieb, 305 U.S. 165, 170-171, 59 S. ct. 134, 83 L. Ed 104, 108 (1938). And Pansy vs. Borough of Stroudsburg, 23 F.3d 772, 784 n. 13 (3rd. Cir. 1994).

2. Both state and federal courts must apply federal law to determine whether judgments in federal -question cases are entitled to recognition. See Heck vs. Humphrey, 512 U.S. 477, 488 n. 9, 114 ct. 2364, 129 L.. Ed. 2d 383 (1994) ('state courts are bound to apply federal rules in determining the preclusive effect of federal court decisions on issues of federal law.")' Gelb vs. Royal Globe Ins. Co., 798 F. 2d 38, 41-42 (2nd Cir. 1986), cert. denied, 480 U.S. 948 (1987) ("A state court must apply federal law to determine the preclusive effect of a prior federal question judgment.").

Prior Judgement by Federal Court Sitting in Diversity:

Since the adoption of federal rules of civil procedure, the better rule is that judgements of federal courts sitting in diversity should be given preclusive effect based on federal law. The federal rules of civil procedure governing joinder of claims and parties, See Fed. R. Civ. P. 13(a), 18, 19, 20., which are often interwined with claim and issue preclusions issues, are evaluated under federal law. See Hanna vs. Plumer, 380 U.S. 460, 467-474, 85 s. ct. 1136, 14 L. Ed. 2d 8 (9165) (Federal rules of procedure apply in diversity actions).

However, even if the subject matter dismissal is without prejudice because not on the merits, it may result in the suit being untimely filed in the proper jurisdiction. Such consequences do not turn the decision into one on the merits nor supply grounds for findings an abuse of discretion if the trial court denies plaintiff's Rule 60(B) motion to set aside the dismissal. Verret vs. Elliot Equip. Corp., 734 F. 2d 235, 238 (5th Cir. 1984).

The possibility that the statute of limitations would prevent the commencement of a new action in state court cannot confer jurisdiction on a federal court in the absence of a showing of diversity. Gilbert vs. David, 235 U.S. 561, 568 (1915): Freeman vs. Northwest Acceptance Corp., 754 F. 2d 553, 560 (5th Cir. 1985).

14-15 Discovery of Jurisdiction Facts.

Federal courts clearly have the power to order discovery on jurisdictional issues. U.S. Catholic Conference vs. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988): Oppenheimer Fund. Inc. vs. Sanders, 437 U.S.. 340, .351 n. 13 (1978).

OPINION BELOW

Opinion by U.S. District Judge Todd J. Campbell case number 3:06-0334, Kelvin DeWayne Altheimer vs. Seton Corporation d/b/a Baptist Hospital: pending before the court is a report and recommendation of the magistrate judge dated August 15, 2006 (Docket No. 22) to which no objections have been filed. The court has made a de novo review of the magistrate judge's findings and the record. 28 U.S.C. 636(b)(1)(B). The magistrate judge's report and recommendation (Docket No. 22) is adopted and approved.

Accordingly, plaintiff motion not to dismiss plaintiff's complaint and claim (Docket No. 16) is denied. Plaintiff's motion for a recoil (Docket No. 16) is denied. Plaintiff's motion to supplement records (Docket No. 19) is denied. Plaintiff's claim supporting my claim for relief (Docket No. 20) is denied. Defendant's motion to dismiss (Docket No. 9) is granted of this order shall constitute final judgment in this action. Fed. R. Civ. P. 58. Any appeal of this order would not be taken in good faith. 28 U.S.C. 1915 (a) (3). The plaintiff is not certified to pursue an appeal in forma pauperis. Id. It is so ordered by U.S. District judge /s/ Todd J. Campbell, filed Aug. 31, 2006.

Rule 12.04 Relation Back Doctine:

When a 1983 plaintiff amends a timely filed federal court compliant, it may be necessary to determine, whether the amended complaint relates back to the date of the original pleading.

[A] Introduction:

The "ralation back" issue has arisen most frequently in 1983 cases in the context of amnedments adding party

defendants or changing or clarify the capacities in which officials are sued. For example, an amended complaint might be filed when the original complaint named a "John Doe" defendant whose identity was first learned after commencement of the action; [333] when the claimant named defendant Smith but after commencement learns that Jones, not Smith, was the wrong doer. Whether an amended complaint relates back to the filing of the original complaint is governed by Rule 15 (c) of the Federal Rules of Civil Procedure. This rule was substantially revised in 1991. Prior to the 1991 amendments, the Supreme Court, in Schiavone vs. Fortune, 477 U.S. 21 (1986), ruled that Rule 15 (c) required the satisfaction of three conditions for an amended complaint naming a new defendant to relate bact to the filing of the original complaint:

1) The claim asserted in the amended complaint must have arisen out of the same transaction or occurrence set forth in the original complaint.

2) Within the limitations period, the newly named defendant received such notice of the institution of the action that she would not be prejudiced in maintaining a defense.

3) Within the limitations period, the newly named defendant knew or shoould have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against her. See section 1983 decisions applying Rule 15 (c) as interpreted in Schiavone. Schiavone vs. Fortune, 477 U.S. 21 (1986); Ayala Serrano vs. Lebron Gonzalez, 909 F 2d 8 (1st Cir. 1990); Moore vs. Long, 924 F. 2d 586 (5th Cir. 1991); Moore vs. Indiana, 999 F. 2d 1125, 1130 (7th Cir. 1993); and Hill vs. Shelander, 924 F. 2d 1370, 1378 (7th Cir. 1991).

State courts, like the federal courts, must also fill

in the procedural details that arise in the litigation of 1983 claims that are not covered by Federal Law, principally the statute of Limitations period and survivorship of claim. Professor Steinglass argues that "[w]hen 1983 cases are filed in state courts, state courts are required to apply federal policies governing the cause of action, including policies borrowed from state law." S. Steinglass, Section 1983 Litigation in State Courts 10.66 (2002). Even if this were not the case, the supremacy clause demands that state rule apply by a court be consistant with the policies and goals of 1983. See Felder vs. Casey, 487 U.S. 131, 140-41 (9188). See also Howlett vs. Rose, 496 U.S.356 (1990); County of Los Angeles vs. Superior Court, 87 Cal. Rptr. 2d 441, 981 P 2d 68 (1999).

Rules: Federal Court Jurisdiction
[A] Subject Matter Jurisdiction:

Should the court find that the federal claim is insubstantial, it should dismiss the action for lack of subject matter jurisdiction. A dismissal for lack of subject matter jurisdiction is not a determination that is on the merits for the purpose of preclusion. Bell vs. Hood, 327 U.S. 678, 682 (1946). Such a dismissal negates the potential use of the federal claim to support supplemental jurisdiction. See 1.07 [c] infra.

In contrast, when the court has subject matter jurisdiction because the federal claim is not insubstantial, a dismissal for failure to state a claim upon which relief may be granted is a ruling on the merits for purpose of preclusion. See Bell vs. Hood 327 U.S. 678, 682 (1946). Supplemental jurisdiction may be asserted in this circumstance, because the court has subject matter jurisdiction over the federal claim. See 1.07 [A] infra.

The theory is that the United States Supreme Court is the only Federal Court with authority to review state court judgments in civil cases. District of Columbia Court of Appeals vs. Feldman, 460 U.S. 462, 476 (9183) (citing 28 U.S.C. 1257). Accord ASARCO, Inc. vs. Kadish, 490 U.S. 605, 622 (1989) (" The Rooker-Feldman doctrine interprests 28 U.S.C. 1257.

Principles Governing Preclusive Effect of Determinations in State Criminal proceedings in Federal Court 1983 Action.

Allen vs. McC urry did recognize an exception to the 1983 preclusion rule for cases in which the state does "not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Allen, 449 U.S. at 101. See 11.08 infra.

This exception merely restates the traditional rule that collateral estoppel is inapplicable "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. 449 U.S. at 101 [Davidson vs. Capuanao, 792 F. 2d 275 (2d Cir. 1986); Parker vs. Blauvelt volunteer Fire Department, 93 N.Y. 2d 343 (1999).

Opinion by U.S. District Judge Todd J. Campbell case number 3-06-0334., Kelvin DeWayne Altheimer vs. Seton Corporation d/b/a Baptist Hospital: pending before the court are plaintiff's objections (docket No. 25) to the report and recommendation of the magistrate judge (Docket No. 22) The court has reviewed plaintiff's objections.

Plaintiff's objections (Docket No. 25) are overruled and the report and recommendation of the magistrate judge (Docket No. 22) is adopted and approved in accordance with the court's earlier order (Docket No. 24). Any appeal of this order would not be taken in good faith. 28 U.S. C. 1915 (a) (3). The plaintiff is not certified to pursue an appeal in Forma Pauperis. Id. It is so ordered by U.S. District Judge /s/ Todd J. Campbell, filed on September 5, 2006.

Statement of the Issue for Review

A district court's certification that an appeal is not taken in good faith is subject to appellate review under appellate Rule 24(a). [4.3]

District Court's certification is subject to appellate review. Baugh vs. Taylor, 117 F.3d 197, 199-202 (5th Cir. 1997) (Statutory provision - 28 U.S.C. 1915(a)(3) does not represent substantive change in decades of existing practice and does not supersede Fed. R. App. 24(a) which permits party to petition circuit court for pauper status after district court's certification that appeal is not in good faith. (5th, 6th, 8th and D.C. Circuits)

1) New facts do not necessarily create new claim. Statute of Limitations. New facts concerning the same transaction or series of transaction may sometimes form the basis of a subsequent claim under various exceptions developed by the courts. The primary exceptions are 1) plaintiff in the prior action was unaware of the additional facts due to the fraud or negligent misrepresentation of the other party. See McCarty vs. First of GA. Ins. Co., 713 F. 2d 609, 612-613 (10th Cir. 1983). (Continued denial by Ins. Co. of existence of any policy of ins. with plaintiffs justified second action when policy was discovered);

restatement (second) of judgments 26 cmt. j (1982).

2) The new facts alleged in support of the claim are significant and create new legal conditions.

3) It has been held that new facts might justify a subsequent action if the plaintiff could not have discovered the facts with due diligence at the time of filing of the prior action, See e.g. Guerrero vs. Katzen, 774 F. 2d 506, 508 (D.C. Cir.1985) or if plaintiff was "blamelessly ignorant" of such facts at the time of the prior action. See Marrapese vs. Rhode Island, 749 F. 2d 934, 937 (1st Cir. 1984), cert denied 474 U.S. 9221 (1985 (Courts have recognized, however, an exception to the general rule against claim splitting where the plaintiff's "blameless ignorance' of his injury or its causes resulted in his not bringing suit until after the limitation period had elapsed.")

Appendix B

In the Supreme Court of the United States of Appeals for the Ninth Circuit.

No. _____

Kelvin DeWayne Altheimer,
Plaintiff
vs.
Seton Corporation d/b/a
Baptist Hospital, Respondent

Appeals from U.S. Court of Appeals for the Sixth Circuit Court; submitted September 15, 2006. Decided Feb. 14, 2008. Case Number 06-6307. By Judge Louis F. Oberdorfer, District of Columbia.

Opinion

Opinion before: Martin and Sutton, Circuit Judges; Oberdorfer, District Judge case number 06-6307 United State Court of Appeals for the Sixth Circuit, Kelvin DeWayne Altheimer vs. Seton Corporation, d/b/a/ Baptist Hospital: Kelvin DeWayne Altheimer, proceeding pro se, appeals a district court order dismissing his civil rights complaint filed pursuant to 42 U.S.C. 1981, 1982, and 1983. This case has been referred to a panel of the court pursuant to Rule 343 (j)(1), rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a). On April 5, 2006, Altheimer, a black man, filed the instant complaint against Seton Corporation, d/b/a Baptist Hospital. The complaint alleged race discrimination based upon an incident that occurred on January 22, 2005, at Baptist Hospital. Altheimer alleged that on January 22, 2005, he went to Baptist Hospital at approximately 3:00 a.m. seeking treatment for a headache. Altheimer received treatment, ate breakfast, and was discharged at approximately 11:00 a.m. that same day. Altheimer alleged that while he was sitting in the waiting room after his release, Baptist Hospital security Officer Robert Antone told him that he had to leave the hospital within thirty minutes. Altheimer subsequently "proceeded to the front lobby to see if [his] ride was there." At that point, according to Altheimer, Antone sprayed him with pepper spray and forced him to the ground. Altheimer was then taken to jail by the police and charged with disorderly conduct, and charged that was dismissed on March 4, 2005.

Altheimer sought monetary relief only. Altheimer had previously filed federal and state court actions

against Baptist Hospital based upon the January 22, 2005, incident. Altheimer's federal suit was dismissed for lack of subject matter jurisdiction on March 10, 2005. Altheimer's state action was dismissed with prejudice following a bench trial on August 8, 2005.

Baptist Hospital filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the instant complaint, to which Altheimer responded. A magistrate judge filed a report in which he recommended granting Baptist Hospital's motion. Over Altheimer's objections, the district court adopted and approved the magistrate judge's report and recommendation and dismissed the case. Altheiemr filed a timely appeal. Baptist Hospital has filed a motion for sanctions, to which Altheimer has filed a response.

We review de novo the district court's dismissal of a suit pursuant to Fed. R. Civ. P. 12(b)(6). Adika vs. Smith 466 F. 3d 503, 505 (6th Cir. 2006). When "reviewing a 12(b)(6) dismissal, this court must accept all facts in the complaint as true and construe the complaint liberally in favor of the plaintiff." Id.

Upon review, we conclude that the district court properly dismissed Altheimer's complaint because it failed to state a claim upon which relief my be granted. First, Altheimer's complaint failed to state a claim for relief under 1981, which concerns discrimination in the formation and enforcement of contracts. Section 1981 (a) provides that "[a] 11 persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts... as is enjoyed by white citizens..." Altheimer did not allege any contractual issues in his complaint.

Second, Altheimer's complaint failed to state a claim for relief under 1982, which concerns discrimination with respect to property rights. Section 1982 provides

that: "[a] 11 citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens there of to inherit, purchase, lease, sell, hold, and convey real and personal property."

Altheimer did not allege that Baptist Hospital discriminated against him with respect to the conveyance of real or personal property.

Third, Altheimer's complaint failed to state a claim for relief pursuant to 1983, which concerns "the deprivation of any rights, privileges, or immunities secured by the constitution and laws."

Baptist Hospital is not a state actor subject to liability under 1983. See 42 U.S.C. 1983; Flagg Bros. vs,. Brooks, 436 U.S. 149, 155 (1978); Redding vs. St. Eward, 241 F. 3d 530, 532 (6th Cir. 2001). Although private citizens acting in concert with state officials may be subject to 1983 liability, Dennis V. Sparks, 449 U.S. 24, 27-28 (9180), Altheimer did not allege that Baptist Hospital conspired with any state officials.

In addition, because Altheimer's complaint, filed on April 5, 2006, is based upon alleged conduct that occurred on January 22, 2005, it is time-barred by the applicable one-year statute of limitations. See Meriweather vs. City of Memphis, 107 F. 3d 396, 398 (6th Cir. 1997); Tenn. Code Ann. 28-3-104(a)(3).

Finally, Altheimer's 1983 civil rights complaint is barred by the doctrine of res judicata because: 1) Altheimer's prior state civil action and the instant federal civil action involved the same parties, namely Altheimer and Baptist Hospital; 2) both actions are based upon and arise out of the same facts and allegations, namely Altheimer's visit to Baptist Hospital on January 22, 2005; 3) the prior state court action was adjudicated on the merits: and 4) the instant action involves issues that

were or could have been raised and litigated in the prior state court action. See Federated Dep't Stores, Inc. vs. Moitie, 452 U.S. 394, 398 (1981); J.Z.G. Res., Inc. vs. Shelby Ins. Co., 84 F. 3d 211, 214 (6th Cir. 1996). Federal courts must give the same preclusive effect to a previous state court judgement that such judgement would receive in the courts of city Sch. Dist. Bd. of Educ., 465 U.S. 75, 85 (1984); Dyer vs. Intera Corp., 870 F. 2d 1062, 1066 (6th Cir. 1989); Whitfiield vs. City of Knoxville, 756 F. 2d 455, 459 (6th Cir. 1985).

In a separately filed motion, as required by Fed. R. App. P. 38, Baptist Hospital requests the imposition of sanctions in the form of damages and costs, including reasonable attorney fees. Although Altheimer's appeal is obviously without merit, we decline to impose sanctions in this case because Baptist Hospital has not established that it was prosecuted for an improper purposes. See Barney vs. Holzer Clinic, 110 F. 3d 1207, 1212 (6th Cir. 1997). Accordingly, we deny the motion for sanctions and affirm the district court's order. Rule 34(j)(2)(c), Rules of the Sixth Circuit. Entered by order of the court /s/ clerk. The honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

RULES

If the question is whether the prior judgment is to be given preclusive effect, then the meaning of the "on the merits" requirement varies with the form of preclusion. For the purposes of claim preclusion (res judicata), a judgment is on the merits if it is rendered upon consideration of the legal claim as distinguished from consideration of an objection to subject matter jurisdiction personal jurisdiction, service of process, venue, or any other ground that does not go to the legal

or factual sufficiency of the claim to relief.

If the question is whether the prior judgment is to be given issue preclusive effect, then the question is whether the issue in the prior case was decided on the merits.[51]

"Judgement" on the merits" for issue preclusion purposes. See Simmons vs. O'Brien, 77 F.3d 1093, 1097 n.4 (8th Cir. 1996) ("For issue preclusion to apply, the issue preclusion to apply, the issue raised in the second proceeding need only have been raised in the first proceeding by the party sought to be precluded and necessarily determined on the merits in a proceeding affording a full and fair opportunity to litigate the issue.")

Statements of Evidence

1. The defendant's witness list. 2. Police Arrest Report.

* Statute of Limitations: As a general matter, however, there may be strong federal interest in crafting uniform federal rules governing the preclusive effect of all federal judgements, including diversity judgements. Since the adoption of the federal rules of civil procedure, the better rule is that judgments of federal courts sitting in diversity should be given preclusive effect based on federal law. The federal rules of civil procedure governing joinder of claims and parties, see Fed. R. Civ. p. 13(a), 18, 19, 20. Which are often interwined with claim evaluated under federal law. See rules for joinder of claims and parties are evaluated under federal law. See Hanna vs. Plumer, 380 U.S. 460, 467-474, 85 x. ct. 1136, 14 L. Ed. 2d 8 (1965) (Federal Rules of Procedure apply in diversity actions).

With respect to the narrow issue in Semtek, there was no "conflict with potential federal interests. See Semtek Int'l Inc. vs. Lockheed Martin Corp., U.S. 121 s.

ct. 1021, 1029, 149 L. Ed. 2d 132 (2001) ("no such conflict with potential federal interests exists in the present case.").

"Determination of Foreign Law"

Rules

Issue Preclusion and Collateral Estoppel

[B] Restatement View

[i] Suggested Factor for Consideration.

When there is a lack of total identity between the matters presented in the two proceedings, several factors should be considered in deciding whether for purpose of issue preclusion, the "issue" in the two proceedings is the same: See Restatement (second) of Judgement 27 cmt. c (1992).

1. Is there a substantial overlap between the evidence or argument to be advanced in the two proceedings?

2. Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding?

3. Could pre-trial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be present in the second?

4. How closely related are the claims involved in the two proceedings?

These consideration have been adopted by some courts: See Valley Disposal, Inc. vs. Central Vt. solid Waste Mgmt. Dist., 31 F.3d 89, 97-99 (2nd Cir. 1994) (quoting restatement (second) of judgment 27 cmt. c. (1982)).

Dismissal For Failure to State Claim Upon Which Relief

Can Be Granted:

Federal rule of civil procedure 12(B)(6) provides the basis for dismissing an action for "Failure to state a claim upon which relied can be granted." Some cases, especially those decided before the adoption of federal rules, held that a dismissal for insufficient pleading was not on the merits. It was thought too harsh a remedy to preclude a party with a possibly meritorious claim from pursuing a second action simply because of a failure to meet some technical pleading requirement. 88 See Gould vs. Evansville & C.R.R. Co., 91 U.S. 526, 533-534, 23 L. Ed. 416 (1875) (merits were not heard or decided in first action); Restatement (second) of judgement 19 reporter's notes 166-167 (1982).

This rationale was weakened considerably by the passage of the federal rules of civil procedure, with their liberalized pleading requirements and right of amendment. The restatement (second) of judgements adopted the position that such a dismissal should be considered to be on the merits, reasoning that: Restatement (second) of judgments 19 cmt. d (1982). [s]uch a result is warranted by the ease with which pleadings may be amended, normally at lease once as a matter of course, and by the unfairness of requiring the defendant to submit to a second action (often initiated long after the first has come to an end) when no such amendment is sought, or when no appeal has been taken from an erroneous denial of leave to amend.

[2] Change in applicable law will usually not justify new action:

Although there is contrary authority, the general rule is that a change in the statutory or case law will not alter the claim preclusion effect of a prior judgement.

See Federated Dep't Stores, Inc. vs. Moitie, 452 U.S. 394, 398, 101 s. ct. 2424, 69 L. Ed. 2d 103 (1981); See Chicot County Drainage Dist. vs. Baxter State Bank, 308 U.S. 371, 378, 60 s. ct. 317, 84 L. Ed. 329 (1940); but see state farm Mut. Auto Ins. Co. vs. Duel, 324 U.S. 154, 162, 65 s. ct. 573, 89 L.. Ed. 812 (1945); See Baylor vs. United State Dep't of House. and Urban Dev., 913 F. 2d 223, 225 (5th Cir., 1989)(stating general rule); See Erspan vs. Badgett, 659 F. 2d 26, 27-28 (5th Cir. 1981), cert. denied, 455 U.S. 945 (1982) and also see e.g., United States vs. Fisher, 864 F. 2d 434, 439 (7th Cir. 1988).

The Ninth Circuit does not permit a pro se complaint to be dismissed prior to ruling on the motion to appoint counsel.[81] Johnson vs. U.S. Dep't of Treasury, 939 F. 2d 820, 824 (9th Cir. 1991).

The liberal amendment policy of Rule 15 ensures that a poorly drafted complaint will not be dismissed if it can easily amended to solve the jurisdiction problem.[113] See generally 5A Federal Practice & Procedure 1350.

The jurisdictional allegations in pro se complaints will be held to a less stringent standard than pleadings drafted by counsel. SAC 193 F 3d at 1167, Mann vs. City of tucson Dep't of Police. 782 F. 2d 790, 794 (9th Cir. 1986); See Haines vs. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

Private persons, jointly engaged with State Officials in the prohibited action, are acting under color of law for purpose of 1983.42 U.S.C.A. 1983 Raines v. Shoney'sInc. Citeas 909 F Supp. 1070 (E.D. Tenn. 1995).

Jurisdiction

The opinion of the lower courts decision, to the United States court of appeals for the Ninth Circuit on petition for Writ of Certiorari.

Exhibit 1

Filed with the circuit court for the state of Tennessee, Davidson County. Case NO. 05C-1084

The Defendant Witness List

Defendant, Seton Corporation, submits its witness list. Defendant may call the following witnesses to testify at the trial of this action.

1. Plaintiff;
2. Baptist Security Officer Robert Antone
3. Baptist Hospital Nurse Notgrass
4. Any witnesses listed on plaintiff's witness list
5. Any witnesses necessary to authenticate documents: and
6. Any witnesses necessary for rebuttal or impeachment.

Respectfully submitted.
/s/ Francesca O'Keefe (23810)
Karyn C. Bryant (15422)
Boult, Cummings, Conners, & Berry, PLC

Filed also Federal Case # 3-06-0334 document 1-2 filed 4-5-2006 page 25 of 40.

Exhibit 2

Filed April 18, 2005. Metro Nashville Tennessee Police arrest report: Arrest # 050104453 dated on Jan.

22, 2005 at 11:15 a.m., (Box 23 age 43, Box 24 Date of Birth Oct. 2, 1961, Box 25 Place of Birth Michigan, Box 26 Domestic Violence (No), Box 31 Location of arrest 2000 Church St., box 32 Type of arrest (taken into custody, Box 33 resisted arrest (No), Box 34 assaulted officer (No), Box 35 chemical agent used (Yes) "alcohol, box 36 arrestee was armed (No), Box 53 warrant number GS202948, Box 55 charge disorderly conduct, Box 60 physical evidence (none), Box 62 signed Baptist Hospital security guard Robert Antone, Box 67 perpetrator suspected of using ☐ drugs ☐ alcohol ☐ computer ☑ N/A, Box 68 narrative subject had been in Baptist Hospital E.R., treated for intoxication. After discharged he refused to leave. When confronted by security he engaged in physical confrontation. He was physical subdued by security staff and I transported to looking to obtain warrant. M.P.D. Incident number 05-37043 arresting Officer C. D. Cage 67149 radio call 11SA.

General Sessions Disposition

Printed 3/4/05. The defendant, Kelvin Altheimer. Disorderly Conduct C Misdemenor. Dismissed. Signed by Judge Gloria Dumas.

Certificate of Service

The under signed hereby certifies that a true and correct copy of the foregoing has been forwarded via U.S. mail, postage pre paid to counsel for the defendant, Boult, Cummigs, Conners, & Berry, PLC 1600 Division St., Suite 700 P.O. Box 340025, Nashville, TN 37203.

This 3rd Day of Sept 2008.

Kelvin Altheimer
Plaintiff